

**COMMODITY FUTURES TRADING COMMISSION****RIN 3038-AC52****Exemptive Order for SPDR® Gold Futures Contracts****AGENCY:** Commodity Futures Trading Commission**ACTION:** Final order.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is exempting certain transactions in physically delivered futures contracts based on SPDR® Gold Shares (SPDR® gold futures contracts) from those provisions of the Commodity Exchange Act (CEA or Act),<sup>1</sup> and the Commission's regulations thereunder, that are inconsistent with the trading and clearing of SPDR® gold futures contracts as security futures. The exemption is conditioned on the compliance of transactions in SPDR® gold futures contracts with the requirements established for the trading and clearing of security futures. The authority for the issuance of this exemption is found in Section 4(c) of the Act.<sup>2</sup>

**DATES:** Effective [insert date of publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Bruce Fekrat, Special Counsel, Office of the Director (telephone 202.418.5578, e-mail [bfekrat@cftc.gov](mailto:bfekrat@cftc.gov)), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, DC 20581.

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<sup>1</sup> 7 U.S.C. §§ 1 et seq.

<sup>2</sup> 7 U.S.C. §6(c).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In correspondence dated October 26, 2007, OneChicago, LLC (OneChicago or the Exchange),<sup>3</sup> a board of trade designated with the Commission pursuant to Sections 5 and 6(a) of the Act, proposed and requested Commission approval to list for trading SPDR® gold futures contracts as security futures.<sup>4</sup> OneChicago is notice-registered with the Securities and Exchange Commission (SEC) as a national securities exchange under Section 6(g) of the Securities Exchange Act of 1934 ('34 Act) for the purpose of listing and trading security futures products. The approval request was filed pursuant to Section 5c(c)(2) of the Act and Commission Regulations 40.5 and 41.23.<sup>5</sup> OneChicago submitted its request for approval under the 45-day fast-track review period established by Commission Regulation 40.5. The fast-track review period for the Exchange's submission was scheduled to expire on December 10, 2007. The review period was extended by the Director of the Division of Market Oversight, pursuant to Regulations 40.5(c) and 40.7(a)(1), to January 24, 2008 on the grounds that the SPDR® gold futures contracts raised novel and complex issues that required additional time for review.<sup>6</sup> By

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<sup>3</sup> OneChicago is jointly owned by the CME Group, Inc., IB Exchange Corp., and the Chicago Board Options Exchange.

<sup>4</sup> In accordance with Section 2(a)(9)(B)(i) of the Act, Commission staff forwarded the new contract filing to the Securities and Exchange Commission, the U.S. Department of Treasury and the Board of Governors of the Federal Reserve System on October 29, 2007. No comments were received in response to this correspondence. On January 4, 2008, the Exchange filed a rule amendment concerning minimum price fluctuations to supplement its initial submission.

<sup>5</sup> 7 U.S.C. §7a-2(c)(2), 17 CFR 40.5, 41.23.

<sup>6</sup> Commission Regulations 40.5(c) and 40.7(a)(1) allow the Commission, and certain staff acting pursuant to delegated authority, to extend the 45-day fast-track review period by an additional 45 days if a product raises novel or complex issues requiring additional time for review. 17 CFR 40.5(c), 40.7(a)(1).

letter dated January 23, 2008, the Exchange, upon the request of the Commission's staff, voluntarily extended the review period to March 17, 2008. By letter dated February 26, 2008, the Exchange voluntarily extended the review period to April 30, 2008.<sup>7</sup> By letter dated April 28, 2008, the Exchange further voluntarily extended the review period to May 30, 2008.

On March 14, 2008, the Commission published for public comment in the Federal Register a proposal to exempt, pursuant to Section 4(c) of the Act, SPDR® gold futures contracts from those provisions of the CEA, and the Commission's regulations thereunder, that are inconsistent with the trading and clearing of SPDR® gold futures contracts as security futures.<sup>8</sup> The Commission proposed to issue the exemption in order to facilitate the Exchange's request for contract approval. No formal comments were submitted in response to the Commission's publication.<sup>9</sup>

## **II. CEA Section 4(c) Exemptive Order**

In accordance with the Memorandum of Understanding entered into between the CFTC and the SEC on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to

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<sup>7</sup> Section 5c(c) of the Act requires the Commission to approve any designated contract market instrument submitted for approval within 90 days after the submission of the request unless (1) it finds that the trading or clearing of the instrument would violate the Act (or the Commission's regulations), or (2) the person submitting the request for approval agrees to extend the period of review beyond the 90 day time limitation.

<sup>8</sup> Proposed Exemptive Order for ST [SPDR®] Gold Futures Contracts, 73 FR 13876 (March 14, 2008) (Proposed Order). Effective May 21, 2008, the streetTRACKS® Gold Trust has been restyled as the SPDR® Gold Trust. Consequently, on May 22, 2008 the Exchange filed a rule amendment to reflect that change.

<sup>9</sup> A thorough summary of the Trust's operations is provided in the Proposed Order.

trade in either or both a CFTC or SEC regulated environment, in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority). The Commission has determined to use its authority under Section 4(c) of the Act, as proposed, to exempt transactions in SPDR® gold futures contracts from those provisions of the Act and the Commission's regulations thereunder that, if the underlying were considered to be a commodity that is not a security, would be inconsistent with the trading and clearing of SPDR® gold futures contracts as security futures.<sup>10</sup> Section 4(c)(1) of the CEA empowers the Commission to "promote responsible economic or financial innovation and fair competition" by exempting any transaction or class of transactions<sup>11</sup> from any of the provisions of the Act upon determining that the exemption would be consistent with the public interest.<sup>12</sup> Section 4(c)(2) of

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<sup>10</sup> The Commission recently issued a similar order with respect to exchange-traded credit default products. See Order Exempting the Trading and Clearing of Certain Credit Default Products Pursuant to the Exemptive Authority in Section 4(c) of the Commodity Exchange Act, 72 FR 32079 (June 11, 2007).

<sup>11</sup> Covered transactions are subject to certain exceptions not relevant here.

<sup>12</sup> Section 4(c)(1) of the CEA, 7 U.S.C. §6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from

the Act provides that the Commission may grant exemptions only when it determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue; that the exemption is consistent with the public interest and the purposes of the Act; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any designated contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>13</sup>

With respect to the term “appropriate persons,” Section 4(c)(3) of the Act enumerates several categories of appropriate persons and provides in subparagraph (K) that the term shall include “[s]uch other persons that the Commission determines to be appropriate in light of ... the applicability of appropriate regulatory protections.”

In enacting Section 4(c) of the Act, Congress noted that the goal of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and

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section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

<sup>13</sup> Section 4(c)(2) of the CEA, 7 U.S.C. §6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that--  
(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and  
(B) the agreement, contract, or transaction—  
(i) will be entered into solely between appropriate persons; and  
(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

competitive manner.”<sup>14</sup> SPDR® gold futures contracts are novel instruments and the Commission believes that this is an appropriate case for issuing an exemption, as proposed, without making a finding as to the nature of these particular instruments. Accordingly, given the potential usefulness of SPDR® gold futures contracts to the significant market for the Trust’s Shares, as well as all gold-linked markets, the Commission herein exempts transactions in SPDR® gold futures contracts traded on OneChicago, and the clearing of such contracts as security futures, from the provisions of the Act, and the Commission’s regulations thereunder, to the extent necessary to permit them to be so traded and cleared. In the Commission’s opinion, the issuance of this exemptive order is in the public interest and is consistent with the purposes of the Act, because it will likely foster both financial innovation by bringing an innovative derivatives product to market, and competition by not potentially excluding other similarly innovative products from trading on regulated futures markets. In addition, SPDR® gold futures contracts, when traded as security futures pursuant to this exemption and the Commission’s subsequent or concurrent approval of the Exchange’s submissions, will be subject to regulation by both the SEC and the Commission.<sup>15</sup> The implementation of an exemption, under these circumstances, will not erode appropriate regulatory protections, and thus SPDR® gold futures contracts will be traded by appropriate persons. Nor will this exemption impair the ability of the Commission or OneChicago to discharge any regulatory or self-regulatory duty under the Act.

This Order is subject to termination or revision, on a prospective basis, if the Commission determines upon further information that this exemption is not consistent with the public interest.

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<sup>14</sup> H.R. CONF. REP. NO. 102-978, 1992 U.S.C.C.A.N. 3179, at 3213 (H.R. CONF. REP.).

<sup>15</sup> 7 U.S.C. §2(a)(1)(A). Security futures are subject to joint regulation by the CFTC and the SEC under Section 2(a)(1)(D) of the CEA, 7 U.S.C. §2(a)(1)(D).

If the Commission believes such exemption becomes detrimental to the public interest, the Commission may revoke this Order on its own motion.

### **III. Related Matters**

#### **A. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA)<sup>16</sup> imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This exemptive order does not require a new collection of information from any entity that would be subject to the order.

#### **B. Cost-Benefit Analysis**

Section 15(a) of the CEA, as amended by Section 119 of the Commodity Futures Modernization Act of 2000,<sup>17</sup> requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. Section 15(a) of the Act further specifies that costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action. The Commission may give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding potential costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of

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<sup>16</sup> 44 U.S.C. §3507(d).

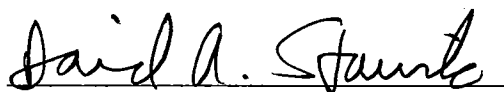
<sup>17</sup> 7 U.S.C. §19(a).

the provisions or to accomplish any of the purposes of the CEA.

In the Proposed Order, the Commission analyzed the costs and benefits associated with the implementation of an exemption under Section 4(c) of the Act. The Commission invited public comment on its analysis of the costs and benefits associated with the issuance of an exemptive order under Section 4(c) of the Act.<sup>18</sup> No comments were submitted to the Commission.

After considering the factors presented in this release, the Commission has determined to issue this Order.

Issued in Washington, DC, on May 30, 2008 by the Commission.

A handwritten signature in black ink, reading "David A. Stawick". The signature is written in a cursive style and is positioned above a horizontal line.

David A. Stawick  
Secretary of the Commission

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<sup>18</sup> Proposed Order at 13870.